Supreme Court, U.S.
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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SARA ALVAREZ, ANIBAL RODRIGUEZ, DOLORES CASTRO, HILDA RODRIGUEZ, and SAADIA PIMENTEL,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May the United States obtain automatic dismissal under the fugitive disentitlement doctrine of adverse claims in a civil forfeiture proceeding where (a) the property is located wholly outside the United States, (b) the claimants are neither residents nor citizens of the United States, and the court lacks personal jurisdiction over them, and (c) the indictment from which they allegedly fled was filed only after the claimants objected to the forfeiture, long after the original indictment on which the forfeiture was based, and the only overt acts allegedly involving the claimants were not directed at any action or property within the United States?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-

SARA ALVAREZ, ANIBAL RODRIGUEZ, DOLORES CASTRO, HILDA RODRIGUEZ, and SAADIA PIMENTEL,

Petitioners,

v.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is unreported and is reproduced in the Appendix at 1a-3a. The decisions of the United States District Court for the Middle District of Florida are unreported and are reproduced at App. 4a-8a, 9a-13a, 14a-19a, and 20a-22a.

JURISDICTION

The Court of Appeals entered its judgment on April 13, 1994. Petitioners filed a timely petition for rehearing and suggestion for rehearing en banc, which was denied on June 20, 1994 (App. 23a-25a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

At the time the actions below were commenced, 28 U.S.C. § 1355 provided, in relevant part:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

In October, 1992, the statute was amended to add the following provision, among others:

> (b)(1) A forfeiture action or proceeding may be brought in--
>
> > (A) the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred, or
> >
> > (B) any other district where venue for the forfeiture action or proceeding is specifically provided for in section 1395 of this title or any other statute.
>
> (2) Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought as provided in paragraph (1), or in the United States District Court for the District of Columbia.

STATEMENT OF THE CASE

This case involves an attempt by the United States government to forfeit property located wholly outside the

United States that is owned by individuals who are neither citizens nor residents of the United States. Rather than deciding the merits of the claims at issue here, the lower courts dismissed petitioners' claims to the property because they failed to appear in a criminal case brought against them *after* they raised significant claims on the merits and jurisdictional defenses in the civil forfeiture proceedings.

On February 24, 1989, the United States government obtained an indictment in the United States District Court for the Middle District of Florida of numerous alleged members of a cocaine smuggling conspiracy. RE 23.[1] None of these petitioners was named in the indictment. On December 15, 1989, law enforcement authorities in Colombia killed Jose Rodriguez Gacha, an alleged member of the conspiracy and a relative of petitioners. RE 30. On January 26, 1990, the government filed a superseding indictment. Again, none of these petitioners was named in that indictment.

Pursuant to 28 U.S.C. § 1355 and § 2461, 18 U.S.C. § 981, and 21 U.S.C. § 881, on August 2 and August 21, 1991, the United States filed civil forfeiture actions in the Middle District of Florida to seize various assets allegedly belonging to Mr. Gacha. RE 19. The government contended that the assets were the traceable proceeds of, or were intended to be used in, drug trafficking. RE 20. Four of the civil forfeiture actions sought assets held in bank accounts outside the United States, not in the name of Mr. Gacha, but in the names of companies in which petitioners claimed an interest.[2] Each petitioner filed a verified claim

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[1] References to the Record Excerpts in the Court of Appeals are designated RE, followed by a page number. The citations herein are to Appellant's Record Excerpts and Supplemental Record excerpts in Eleventh Circuit No. 92-2294.

[2] The four actions were assigned to one of two district court judges. For the sake of simplicity, the district "courts" below are

(continued...)

in the actions directed at forfeiture of his or her assets. RE 33. Petitioners maintained that the money in their accounts had been earned through legitimate businesses primarily in Colombia. RE 34. According to the deposition testimony of the lead government agent handling the underlying investigation, the practice of Colombians depositing "flight capital" in foreign banks, to be used if they decide to leave Colombia in the future, is a legitimate and common practice in Colombia.

The *res*, or property, at issue is approximately $5,500,000, held in eight bank accounts in London, the Isle of Man, and Switzerland. The funds originally held in Switzerland were transferred to a Florida bank before petitioners filed any claim to those accounts. Since that transfer occurred after the *in rem* actions were filed, this petition will refer to the location of the *res* as of the time of the filing of these actions, when *in rem* jurisdiction, if any, would have had to attach.

On October 16, 1991, petitioners filed motions to dismiss based on lack of *in rem* jurisdiction, since all of the property at issue was located outside the United States. They relied in large part on *United States v. One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.), *cert. denied*, 487 U.S. 1204 (1988), which based *in rem* jurisdiction on the presence of

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[2](...continued)
collectively referred to as the district "court."

The parties filed all motions and other papers discussed herein on the same days in district court cases No. 91-647-CIV-J-16, No. 91-649-CIV-J-16, and No. 91-646-CIV-J-10. The dates cited herein are the dates on which events occurred in these three cases. In No. 91-1013-CIV-J-12, not all events occurred on these same days, and petitioners did not file the two claimants' motions discussed herein. However, since the Eleventh Circuit consolidated the four cases and did not distinguish among them, and because the same issues present themselves in all four, this petition does not distinguish among them.

the *res* in the court's territorial jurisdiction. RE 69, 73, 74. Petitioners' position was strengthened on November 4, 1991, when another district court relied on the Eleventh Circuit's decision in *One Lear Jet Aircraft* in holding that the United States did not have *in rem* jurisdiction over money in a Hong Kong bank. *United States v. $3,035,648.50 and $330,000 in Hong Kong and Shanghai Banks*, CIV-91-217E (W.D.N.Y. Nov. 4, 1991).

The government's oppositions to petitioners' motions to dismiss were originally due on October 26, 1991, but the government twice sought extensions of time. RE 6, 7. Meanwhile, the parties proceeded to take and notice discovery, and petitioners agreed to travel to the United States at their own expense to be deposed.

Then, on November 22, 1991, the government obtained a second Superseding Indictment, which charged petitioners, along with the numerous other people previously named as defendants, in connection with the alleged conspiracy at the base of the forfeiture action. The only specific allegations involving petitioners asserted that they became signatories to bank accounts outside the United States in which proceeds from the alleged cocaine smuggling operation were deposited, including the accounts in the forfeiture actions. The charges against petitioners carried penalties of large fines and up to life imprisonment.

The timing of the government's action--obtaining an indictment of petitioners after they filed motions to dismiss and claims on the merits, and after another court had found lack of *in rem* jurisdiction in similar circumstances based on controlling Eleventh Circuit authority--offered reason to suspect that the government had acted in bad faith. Accordingly, petitioners filed Motions for Protective Orders and Stays of General Discovery. RE 58. In its oppositions to those motions, the government made no secret of its reason for obtaining the Superseding Indictment against petitioners: it assumed that petitioners would not appear at

their arraignment; and, therefore, it was preparing its own motion to dismiss on the ground that the actions could be "readily disposed of under the fugitive disentitlement doctrine," under which criminal appeals and certain other claims of fugitives may be dismissed without reaching the merits. RE 66.

Finally, on December 9, 1991, the government filed its oppositions to petitioners' motions to dismiss for lack of jurisdiction. RE 78. The government distinguished the recent decision in *United States v. $3,035,648.50 and $330,000 in Hong Kong and Shanghai Banks*, in part because "the Colombian Claimants are under criminal indictment." RE 84.

To no one's surprise, petitioners' depositions were cancelled, and they did not appear in the criminal case, since had they appeared they surely would have been arrested immediately. Thereafter, the district court denied petitioners' motions to dismiss and granted the government's motions to dismiss on the basis of the fugitive disentitlement doctrine. App. 4a-8a, 9a-13a; *see also* App. 14a-19a. In dismissing petitioners' claims, the district court relied on *United States v. One Parcel of Real Estate*, 868 F.2d 1214 (11th Cir. 1989), in which the court of appeals had upheld the application of the fugitive disentitlement doctrine to dismiss the claim in a civil forfeiture action involving property wholly within the United States that allegedly belonged to a Colombian under indictment in the United States. The court then addressed claimants' motion to dismiss for lack of jurisdiction over the *res*:

> Were Claimant not a fugitive from justice, a substantial objection to *in rem* jurisdiction would be at issue. It is far from settled as to whether a court has *in rem* jurisdiction when the *res* is located not only outside the court's own district, but outside the United States as well. However, that issue need not be decided here,

> due to the Claimant's status as a fugitive from justice.

App. 7a; 12a (citation omitted).

The United States Court of Appeals for the Eleventh Circuit affirmed the district court's dismissals of petitioners' claims in a two-sentence decision, simply citing *One Parcel of Real Estate*. The court did not even address the issues of whether the district court below had jurisdiction to entertain the forfeiture actions or whether the government had acted in bad faith. App. 3a.

REASONS FOR GRANTING THE WRIT

A. The Eleventh Circuit Applied A Sweeping Rule In Dismissing Petitioners' Claims, Contrary To This Court's Teaching In *Ortega-Rodriguez*.

The fugitive disentitlement doctrine is an equitable doctrine, giving a court discretion to dismiss a criminal appeal where the appellant is or becomes a fugitive in the same or a related case. *See Ortega-Rodriguez v. United States*, __ U.S. __, 113 S. Ct. 1199 (1993). Although developed in the context of a criminal defendant who flees after conviction, while his or her own appeal is pending, *see, e.g., Smith v. United States*, 94 U.S. 97 (1876); *Molinaro v. New Jersey*, 396 U.S. 365 (1970); *Estelle v. Dorrough*, 420 U.S. 534 (1975), the doctrine has also been used to dismiss claims in related civil actions. *See, e.g., United States v. One Parcel of Real Estate*, 868 F.2d 1214, 1216 (11th Cir. 1989) (citing cases).

In *Ortega-Rodriguez*, this Court stated that courts may develop rules to guide their discretion in applying the doctrine in a given case, but the rules must be based on "specific, recurring situations." *Ortega-Rodriguez*, 113 S. Ct. at 1209 n.23. Because the Eleventh Circuit had

reflexively applied the fugitive disentitlement doctrine in that case, using the doctrine to require automatic dismissal of "too many appeals," this Court reversed and remanded. *Id.* at 1209 & n.23.

Here again, the Eleventh Circuit has swept too broadly, clearly deviating from this Court's instructions. Although this Court in *Ortega-Rodriguez* identified certain factors that can be properly taken into account in considering various applications of the doctrine, *see id.* at 1206-09, the decisions below offer no suggestion that the lower courts considered any of these factors, or any other factors, in deciding these cases.[3]

Thus, the Eleventh Circuit's two-sentence decision in this case relied solely on *One Parcel of Real Estate* to affirm the district court's dismissals of petitioners' claims in the forfeiture proceedings. App. 3a. The claimant in *One Parcel of Real Estate* was a Colombian who had filed a claim in a civil forfeiture action, but the *res* at issue was real property located in Florida. Soon thereafter, he was indicted for narcotics trafficking, a charge directly related to the forfeiture action. When he did not come to the United States to appear in the criminal case, the district court determined that he was a fugitive from justice and dismissed his claim to the property on that ground. The court of appeals affirmed.

Unlike *One Parcel of Real Estate*, where the property at issue indisputably was located within the court's jurisdiction, the property at issue here was maintained in

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[3]In contrast, courts in other circuits take into consideration the range of circumstances and arguments presented in applying their rules for application of the fugitive disentitlement doctrine. *See, e.g., United States v. Sudthisa-Ard*, 17 F.3d 1205 (9th Cir. 1994); *United States v. Reese*, 993 F.2d 254 (D.C. Cir. 1993); *United States v. Eng*, 951 F.2d 461 (2d Cir. 1991). *But see United States v. Rosales*, 13 F.3d 1461 (11th Cir. 1994) (on remand for consideration in light of *Ortega-Rodriguez*).

accounts located in London, the Isle of Man, and Switzerland. This difference is crucial because the claimant's ownership of property in Florida in *One Parcel of Real Estate* gave the court control over the property and established some connection between him and the jurisdiction where the action was pending. Here, however, that connection is lacking. All the property at issue is located abroad. Petitioners' only connection to the United States is the pendency of the forfeiture actions--initiated to capture the alleged assets of a third party located outside the United States--and the indictment which followed four months later and which alleged no overt action in the United States by any petitioner.

As this Court recognized in *Ortega-Rodriguez*, blanket application of rules developed in other contexts can lead to unreasonable application of the fugitive disentitlement doctrine, as has occurred here. In this case, the lower courts erred in failing to apply the teachings of this Court to the extraordinary circumstances before them. Here, (a) petitioners have not fled from custody or from the United States; (b) the actions they seek to pursue concern property held outside the United States; (c) the question of whether the district court even had jurisdiction over the actions is, at the least, uncertain; and (d) there is a strong inference that the government indicted petitioners solely to gain an advantage in the civil cases. These facts are very different from those to which the fugitive disentitlement doctrine typically applies and from the facts in *One Parcel of Real Estate*. The facts here should have been specifically considered by the lower courts, and the automatic dismissals, based on rules formulated to handle other fact patterns, were plainly in error. *See Ortega-Rodriguez*, 113 S. Ct. at 1209 n.23 (appellate court may develop "generally applicable rules to cover specific, recurring situations."). Because the Eleventh Circuit failed to heed the teaching of *Ortega-Rodriguez*, review should be granted.

B. The Lower Courts' Erroneous Application Of Rules Developed In Other Contexts Improperly Precluded A Determination Of Whether The Action Was Properly Before The District Court.

Civil forfeiture pursuant to 21 U.S.C. § 881 is not a criminal penalty. Rather, a civil forfeiture action under § 881 is a remedial proceeding that enables the government to seize property used to facilitate the commission of a drug-related crime or to recover proceeds traceable to such a crime. *See* 21 U.S.C. § 881; *United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532, 541-44 (5th Cir. 1987), *cert. denied*, 485 U.S. 976 (1988). *But see id.* at 540-41 (citing Supreme Court cases in which forfeiture statutes were considered criminal for specific purposes). A civil forfeiture proceeding is brought against the property at issue and, therefore, requires that the court have *in rem* jurisdiction over the property. *Id.* at 543 ("civil forfeiture of crime-related property through an *in rem* proceeding") (quoting legislative history). And because forfeiture results in government deprivation of property, it is subject to the requirements of due process. *See United States v. James Daniel Good Real Property*, __ U.S. __, 114 S. Ct. 492 (1993).[4]

In rem jurisdiction requires, at the least, constructive control over the *res*. *Republic National Bank v. United States*, __ U.S. __, 113 S. Ct. 554, 562 (1992) ("the court

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[4] On the other hand, criminal forfeiture is an *in personam* action brought as an additional sanction against a defendant in a criminal case. *D.K.G. Appaloosas*, 829 F.2d at 543 (quoting legislative history of 21 U.S.C. § 853). According to the record in this case, the courts have no personal jurisdiction over petitioners because they are Colombian citizens and residents who conduct no business in the United States. Moreover, they have not been convicted of any crime in the United States.

must have actual or constructive control of the res when an *in rem* forfeiture suit is initiated"). Moreover, 28 U.S.C. § 1355, which provides subject matter jurisdiction in *in rem* forfeiture actions, does not obviate the need for *in rem* jurisdiction over the *res*. *One Lear Jet Aircraft*, 836 F.2d at 1575, *disapproved in part by*, *Republic National Bank*, 113 S. Ct. 554.[5]

In the district court, there was substantial support for petitioners' argument that the court lacked the required control over the *res*--the assets held in foreign banks. In fact, the lead government agent testified in deposition that she did not believe the government could get the money from Hong Kong and London, even if it were successful in the forfeiture actions. Supp. RE 5-6. In addition, the then-recent decision of the United States District Court for the Western District of New York, *see supra* at 5, further supported petitioners' legal position. As even the district court recognized: "It is far from settled as to whether a court has *in rem* jurisdiction where the *res* is located not only outside the court's own district, but outside the United States as well." App. 7a; App. 12a. Nonetheless, the lower courts refused to decide the jurisdictional issue.

Although "[t]he fictions of *in rem* forfeiture were developed primarily to expand the reach of the courts and to furnish remedies for aggrieved parties," *Republic National Bank*, 113 S. Ct. at 559, the procedure employed in this case extends the fictions into fantasy. The result here, deeming the jurisdictional defect waived when petitioners had

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[5] Although § 1355 was amended in 1992, adding subsections (b) - (d), the amendments in no way suggest any change in the requirement of *in rem* jurisdiction. The amended statute simply provides specific authorization for the district courts to hear forfeiture actions involving assets located outside the United States, if *in rem* jurisdiction is otherwise proper under *Republic National Bank*.

specifically raised it and had done so prior to issuance of the second Superseding Indictment, is to obviate the requirement that the court have jurisdiction at all. Where the case against petitioners is largely one of guilt by association (with their relative Gacha), to hold that petitioners have waived all right to due process, have abandoned all jurisdictional objections, and thereby forfeited their rights to their assets in foreign banks because they have not traveled from their homes in South America for the purpose of being arrested here, and to make such findings based on a doctrine developed to deal with totally different circumstances, blatantly violates any notion of fairness and the interests of justice.

C. Application Of The Fugitive Disentitlement Doctrine Under These Circumstances Allows The Government Unfettered Ability To Indict In Bad Faith.

The actions of the government demonstrate that they acted in bad faith, purposely manipulating the system to invoke the fugitive disentitlement doctrine and thus to remove a large obstacle to seizure of $5.5 million belonging to others. The automatic application of the fugitive disentitlement doctrine by the lower courts precluded scrutiny of the issue of the government's bad faith, an issue not present in the cases on which the lower courts relied. *Cf. Harmelin v. Michigan*, 501 U.S. __, 111 S. Ct. 2680, 2693 n.9 (1991) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit").

These forfeiture actions began months before the second Superseding Indictment was issued and were not intentionally directed at petitioners' assets. The initial two indictments did not name any petitioner as a defendant. Not until after petitioners filed claims of ownership and challenged the court's jurisdiction over their assets in other countries did the government seek to indict them. Petitioners were the only individuals charged in the second Superseding Indictment

who had not been charged in the earlier indictment, filed nearly two years before.

Under these circumstances, the government's actions indicate that it acted in bad faith in seeking an indictment of petitioners. Particularly telling is the fact that the government obtained two extensions of time to respond to petitioners' motions to dismiss, time which it used to obtain an indictment against petitioners. Moreover, the indictment followed quickly after a sister court issued a decision, very favorable to petitioners, that was based on case law controlling in the court where the actions below were pending. Thus, the government succeeded in having the claims dismissed without consideration of either the jurisdictional question or of the merits. By dismissing petitioners' claims based on a rule developed to handle very different situations, the courts below allowed the government to abuse its power to indict for the purpose of eliminating obstacles to its specious claims to forfeiture.

As this case demonstrates, the danger of government abuse of the fugitive disentitlement doctrine is particularly strong in light of 28 U.S.C. § 1355, which grants to district courts subject matter jurisdiction over actions brought for any forfeiture, specifically including under the recently added subsection (b) forfeiture of property outside the United States. Combined with the ease with which the government may obtain indictments, *see United States v. Williams*, __ U.S. __, 112 S. Ct. 1735, 1746 (1992) (court will not hear challenge to indictment based on inadequate, unreliable, or incompetent evidence), and the fugitive disentitlement doctrine as applied by the Eleventh Circuit, the government is able to indict individuals *outside* the United States, who the government does not allege have ever even been to the United States, in order to seize their assets *outside* the United States, without a determination on the merits or on jurisdiction. This scheme provides no limit on the government's ability to strip individuals of the protections of due process and fundamental fairness, otherwise guaranteed

to anyone brought before our courts, in an action in which the government itself will profit from the successful forfeiture.

Fundamental notions of due process are deeply offended by conduct such as the government's here. *Cf. James Daniel Good Real Property*, 114 S. Ct. at 502 (due process "is of particular importance here, where the government has a direct pecuniary interest in the outcome of the proceeding"). For this reason as well, the petition should be granted.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CLERK

IN THE UNITED STATES COURT OF APPEAL

FOR THE ELEVENTH CIRCUIT

No. 92-2294

D.C. Docket No. 91-647-CIV-J-16

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CERTAIN FUNDS IN THE UNITED KINGDOM CONTAINED IN ACCOUNT NO. 01042000 (IN THE NAME OF FIDUCORP); 0325310 (IN THE NAME OF FIDUCORP); 03028711 (IN THE NAME OF FIRST INTERSTATE, LTD.), LOCATED AT BANK OF CREDIT AND COMMERCE INTERNATIONAL, PARK LANE, LONDON,

Defendant,

SARA EDILMA PIMENTEL DE ALVAREZ,

Claimant-Appellant.

No. 92-2295

D.C. Docket No. 91-649-CIV-J-16

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CERTAIN FUNDS IN THE UNITED KINGDOM CONTAINED IN ACCOUNT NO. 030008753 (IN THE NAME OF HAVERSTOCK); AT BANK OF CREDIT AND COMMERCE INTERNATIONAL, EDGEWARE ROAD, LONDON,

Defendant,

ANIBAL CASTRO RODRIGUEZ,

Claimant-Appellant.

NO. 92-2940

D.C. Docket No. 91-1013-CIV-J-12

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

U.S. CURRENCY, $8,985,427.20, more or less, plus interest, at the American National Bank of Florida, Jacksonville, Florida, Account No. 408004951-01,

Defendant,

DOLORES RODRIGUEZ DE CASTRO, ANIBAL CASTRO RODRIGUEZ, SARA EDILMA PIMENTEL DE ALVAREZ,

Claimants-Appellants.

No. 93-2424

D.C. Docket No. 91-646-CIV-J-10

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CERTAIN FUNDS, in the Isle of Man contained in a fixed deposit account (in the name of first interstate) account No. 1285/01 deposited on 10th July, 1989 as 365,973 pounds sterling, plus interest, in the current amount of 561,817.46 pounds sterling (in the approximate amount of $786,544.44 U.S. dollars), plus additional interest accruing thereon, located at Barclays Finance Company (Isle of Man) Limited, Barclays House, Victoria Street, Douglas, Isle of Man,

Defendants,

SARA EDILMA PIMENTEL DE ALVAREZ,

Claimant-Appellant.

Appeals from the United States District Court for the Middle District of Florida

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(April 13, 1994)

Before MORGAN, HILL and FAY, Senior Circuit Judges.

PER CURIAM:

We find the issues before us in these matters are controlled by the Court's opinion and ruling in United States v. One Parcel of Real Estate Dade County, Fla., 868 F.2d 1214 (11th Cir. 1989).

The judgment of the district court is affirmed.

NO. 92-2940

D.C. Docket No. 91-1013-CIV-J-12

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

U.S. CURRENCY, $8,985,427.20, more or less, plus interest, at the American National Bank of Florida, Jacksonville, Florida, Account No. 408004951-01,

Defendant,

DOLORES RODRIGUEZ DE CASTRO, ANIBAL CASTRO RODRIGUEZ, SARA EDILMA PIMENTEL DE ALVAREZ,

Claimants-Appellants.

No. 93-2424

D.C. Docket No. 91-646-CIV-J-10

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CERTAIN FUNDS, in the Isle of Man contained in a fixed deposit account (in the name of first interstate) account No. 1285/01 deposited on 10th July, 1989 as 365,973 pounds sterling, plus interest, in the current amount of 561,817.46 pounds sterling (in the approximate amount of $786,544.44 U.S. dollars), plus additional interest accruing thereon, located at Barclays Finance Company (Isle of Man) Limited, Barclays House, Victoria Street, Douglas, Isle of Man,

Defendants,

SARA EDILMA PIMENTEL DE ALVAREZ,

Claimant-Appellant.

Appeals from the United States District Court for the Middle District of Florida

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(April 13, 1994)

Before MORGAN, HILL and FAY, Senior Circuit Judges.

PER CURIAM:

We find the issues before us in these matters are controlled by the Court's opinion and ruling in United States v. One Parcel of Real Estate Dade County, Fla., 868 F.2d 1214 (11th Cir. 1989).

The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v. Case No. 91-647-Civ-J-16

CERTAIN FUNDS IN THE UNITED KINGDOM CONTAINED IN ACCOUNT NOS. 01042000 (IN THE NAME OF FIDUCORP); 03025310 (IN THE NAME OF FIDUCORP); 03028711 (IN THE NAME OF FIRST INTERSTATE, LTD.) LOCATED AT BANK OF CREDIT AND COMMERCE INTERNATIONAL, PARK LANE, LONDON,
Defendant.

ORDER

This cause is before the Court on Claimant Sara Edilma Pimentel de Alvarez's [hereinafter "Claimant"] motion to dismiss (Docket no. 14), and on the government's motion to dismiss claims of Colombian claimants and for entry of final forfeiture judgment (Docket no. 34). Timely responses have been filed.

On August 21, 1991, the government filed a complaint for forfeiture of certain funds located in the United Kingdom at the Bank of Credit and Commerce International, Park Lane, London, contained in account no. 01042000 (in the name of Fiducorp); account no. 03025310 (in the name of Fiducorp); and, account no. 03028711 (in the name of First Interstate, Ltd.). The basis of the government's action is that the Defendant funds represent traceable proceeds of

trafficking in controlled substances or were used or intended to be used to facilitate a violation of 21 U.S.C. § 801, *et seq.*, and the provisions of 18 U.S.C. § 981 (a)(1)(A) in that the funds were involved in transactions or attempted transactions in violation of 18 U.S.C. § 1956(a)(1).

Claimant filed her verified claim to the funds located in account nos. 01042000 and 03028711 on September 24, 1991.[1] On November 22, 1991, a federal grand jury indicted Claimant on violations of federal narcotics laws. Claimant has failed to appear in the criminal case, *United States v. Escobar, et al.*, 89-29-(S3)-Cr-J-16.

As an initial matter, this Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1345,1355. Section 1345 gives the district courts "original jurisdiction of all civil actions, suits or proceedings commenced by the United States ...." Section 1355 gives the district courts "original jurisdiction ... of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress ...." Inasmuch as the United States commenced this case seeking forfeiture under Acts of Congress, it is clear that this Court has subject matter jurisdiction over this action.

Claimant asserts that, because the Defendant funds are located outside of this district (and outside the United States), this Court lack *in rem* jurisdiction over the funds. The government contends that Claimant has no right to contest the forfeiture due to the Claimant's status as "fugitive from justice."

Traditionally, a court's *in rem* jurisdiction derives entirely from its control over the defendant *res*. *United States v. One Lear Jet Aircraft*, 836 F.2d 1571, 1573 (11th

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[1]No claim, answer, or other defensive pleading has been filed as to account no. 03025310. Default was entered as to this account on November 5, 1991, and default judgment as to this account was granted by this Court in a recent Order.

Cir. 1988). In general, the *res* must be physically present within the court's jurisdiction. *See id.* at 1573 (stating that the removal of the *res* from a court's territorial jurisdiction destroys the court's *in rem* jurisdiction).

Unlike subject matter jurisdiction, a claimant to the *res* may waive any objection she has to *in rem* jurisdiction, to the extent of her interest in the *res*. *Cactus Pipe & Supply Co., Inc. v. M/V Montmartre*, 756 F.2d 1103, 1107 (5th Cir. 1985). Waiver can occur when a claimant files a claim without preserving any jurisdictional objection. *See id.* at 1110.

Waiver can also occur by a claimant's decision to remain a fugitive in a related criminal proceeding. In that regard, the "fugitive from justice" doctrine posits that a criminal's flight from justice "disentitles the defendant to call upon the resources of the Court for determination of his claim." *Molinaro v. New Jersey*, 396 U.S. 365, 90 S. Ct. 498 (1970); *see United States v. One Parcel of Real Estate at 7707 S.W. 74th Lane, Miami, Dade County, Florida*, 868 F.2d 1214, 1216 (11th Cir. 1989). A person obtains fugitive status in this context when a person fails to surrender to authorities once she learns that charges against her are pending. *United States v. One Parcel of Real Property in the City of Grandview, Jackson County, Missouri*, 776 F. Supp. 482, 484 (W.D. Mo. 1991) (*citing United States v. Catino*, 735 F.2d 718 (2d Cir.), *cert. denied*, 469 U.S. 855, 105 S. Ct. 180 (1984)). In a civil forfeiture proceeding, the fugitive from justice has essentially "'waived his right to due process.'" *One Parcel of Real Estate*, 868 F.2d at 1217 (quoting *United States v. $45,940*, 739 F.2d 792, 798 (2d Cir. 1984)). The fugitive's own actions disentitle her to raise objections to the forfeiture as claimant to the property. *One Parcel of Real Estate*, 868 F.2d at 1217.

Applying these principles to the case at bar is straightforward. Claimant was indicted in a related criminal

case in this district on November 22, 1991.[2] Her response to the government's motion to dismiss indicates that she has knowledge of the indictment against her, yet she has failed to voluntarily surrender to authorities. Claimant is thus a fugitive from justice who is not entitled to raise objections to the forfeiture as a claimant to the property. Claimant has, by her own actions as a fugitive from justice, waived her right to object to this Court's *in rem* jurisdiction and has rendered this case essentially an "uncontested action." *See id.* In essence, Claimant's jurisdictional objection does not exist.

Were Claimant not a fugitive from justice, a substantial objection to *in rem* jurisdiction would be at issue. It is far from settled as to whether a court has *in rem* jurisdiction when the *res* is located not only outside the court's own district, but outside the United States as well. *See, e.g., One Lear Jet Aircraft*, 836 F.2d at 1573 (11th Cir. 1988) (indicating that physical presence of the *res* is required for a proper exercise of *in rem* jurisdiction); *but see id.* (stating that "the court's power derives entirely from its *control* over the defendant *res*.") (emphasis added). However, that issue need not be decided here, due to the Claimant's status as a fugitive from justice. Accordingly, it is now

ORDERED AND ADJUDGED:

1. Claimant's motion to dismiss (docket no. 14) is denied.

2. The government's motion to dismiss claims of Colombian claimants and for entry of final forfeiture judgment (docket no. 34) is granted. The claim filed on

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[2]Claimant has questioned the propriety of the government's actions in choosing to indict her "mainly to obtain an advantage in the instant civil case." *See* Claimant's response, docket no. 37, at p. 4. Whatever the government's motive was in indicting the Claimant is irrelevant to this case at this time. If Claimant wishes to challenge the indictment, she must do so by filing an appropriate motion in the criminal case.

behalf of Claimant is hereby dismissed, and the Defendant currency in account no. 01042000 and account no. 03028711 is hereby forfeited to the United States of America. The United States Marshals Service is directed to dispose of the Defendant currency in account no. 01042000 and account no. 03028711 in the manner prescribed by law.

DONE AND ORDERED in Chambers in Jacksonville, Florida, this 5 day of February, 1992.

John H. Moore II /sig/
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v. Case No. 91-649-Civ-J-16

CERTAIN FUNDS IN THE UNITED KINGDOM CONTAINED IN ACCOUNT NO. 030008753 (IN THE NAME OF HAVERSTOCK); AT BANK OF CREDIT AND COMMERCE INTERNATIONAL, EDGWARE ROAD, LONDON,
Defendant.

ORDER

This cause is before the Court on Claimant Anibal Castro Rodriguez's [hereinafter "Claimant"] motion to dismiss (Docket no. 12), and on the government's motion to dismiss claims of Colombian claimants and for entry of final forfeiture judgment (Docket no. 29). Timely responses have been filed.

On August 21, 1991, the government filed a complaint for forfeiture of certain funds located in the United Kingdom at the Bank of Credit and Commerce International, Edgware Road, London, contained in account no. 030008753 (in the name of Haverstock). The basis of the government's action is that the Defendant funds represent traceable proceeds of trafficking in controlled substances or were used or intended to be used to facilitate a violation of 21 U.S.C. § 801, *et seq.*, and the provisions of 18 U.S.C. § 981(a)(1)(A) in that

the funds were involved in transactions or attempted transactions in violation of 18 U.S.C. § 1956(a)(1).

Claimant filed her verified claim to the funds located in account no. 030008753 on September 24, 1991. On November 22, 1991, a federal grand jury indicted Claimant on violations of federal narcotics laws. Claimant has failed to voluntarily surrender in the criminal case, *United States v. Escobar, et al.*, 89-29-(S3)-Cr-J-16.

As an initial matter, this Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1345, 1355. Section 1345 gives the district courts "original jurisdiction of all civil actions, suits or proceedings commenced by the United States...." Section 1355 gives the district courts "original jurisdicition ... of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress...." Inasmuch as the United States commenced this case seeking forfeiture under Acts of Congress, it is clear that this Court has subject matter jurisdiction over this action.

Claimant asserts that, because the Defendant funds are located outside of this district (and outside the United States), this Court lacks *in rem* jurisdiction over the funds. The government contends that Claimant has no right to contest the forfeiture due to the Claimant's status as a "fugitive from justice."

Traditionally, a court's *in rem* jurisdiction derives entirely from its control over the defendant *res*. *United States v. One Lear Jet Aircraft*, 836 F.2d 1571, 1573 (11th Cir. 1988). In general, the *res* must be physically present within the court's jurisdiction. *See id.* at 1573 (stating that the removal of the *res* from a court's territorial jurisdiction destroys the court's *in rem* jurisdiction).

Unlike subject matter jurisdiction, a claimant to the *res* may waive any objection she has to *in rem* jurisdiction, to the extent of her interest in the *res*. *Cactus Pipe & Supply Co., Inc. v. M/V Montmartre*, 756 F.2d 1103, 1107 (5th Cir.

1985). Waiver can occur when a claimant files a claim without preserving any jurisdictional objection. *See id.* at 1110.

Waiver can also occur by a claimant's decision to remain a fugitive in a related criminal proceeding. In that regard, the "fugitive from justice" doctrine posits that a criminal's flight from justice "disentitles the defendant to call upon the resources of the Court for determination of his claim." *Molinaro v. New Jersey*, 396 U.S. 365, 90 S. Ct. 498 (1970); *see United States v. One Parcel of Real Estate at 7707 S.W. 74th Lane, Miami, Dade County, Florida*, 868 F.2d 1214, 1216 (11th Cir. 1989). A person obtains fugitive status in this context when a person fails to surrender to authorities once she learns that charges against her are pending. *United States v. One Parcel of Real Property in the City of Grandview, Jackson County, Missouri*, 776 F. Supp. 482, 484 (W.D. Mo. 1991) (*citing United States v. Catino*, 735 F.2d 718 (2d Cir.), *cert. denied*, 469 U.S. 855, 105 S. Ct. 180 (1984)). In a civil forfeiture proceeding, the fugitive from justice has essentially "'waived his right to due process.'" *One Parcel of Real Estate*, 868 F.2d at 1217 (quoting *United States v. $45,940*, 739 F.2d 792, 798 (2d Cir. 1984)). The fugitive's own actions disentitle her to raise objections to the forfeiture as claimant to the property. *One Parcel of Real Estate*, 868 F.2d at 1217.

Applying these principles to the case at bar is straightforward. Claimant was indicted in a related criminal case in this district on November 22, 1991.[1] Her response

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[1]Claimant has questioned the propriety of the government's actions in choosing to indict her "mainly to obtain an advantage in the instant civil case." *See* Claimant's response, docket no. 37, at p. 4. Whatever the government's motive was in indicting the Claimant is irrelevant to this case at this time. If Claimant wishes to challenge the indictment, she must do so by filing an appropriate motion in the criminal case.

to the government's motion to dismiss indicates that she has knowledge of the dictment against her, yet she has failed to voluntarily surrender to authorities. Claimant is thus a fugitive from justice who is not entitled to raise objections to the forfeiture as a claimant to the property. Claimant has, by her own actions as a fugitive from justice, waived her right to object to this Court's *in rem* jurisdiction and has rendered this case essentially an "uncontested action." *See id.* In essence, Claimant's jurisdictional objection does not exist.

Were Claimant not a fugitive from justice, a substantial objection to *in rem* jurisdiction would be at issue. It is far from settled as to whether a court has *in rem* jurisdiction when the *res* is located not only outside the court's own district, but outside the United States as well. *See, e.g., One Lear Jet Aircraft*, 836 F.2d at 1573 (11th Cir. 1988) (indicating that physical presence of the *res* is required for a proper exercise of *in rem* jurisdiction); *but see id.* (stating that "the court's power derives entirely from its *control* over the defendant *res*.") (emphasis added). However, that issue need not be decided here, due to the Claimant's status as a fugitive from justice. Accordingly, it is now

ORDERED AND ADJUDGED:

1. Claimant's motion to dismiss (docket no. 14) is denied.

2. The government's motion to dismiss claims of Colombian claimants and for entry of final forfeiture judgment (docket no. 34) is granted. The claim filed on behalf of Claimant is hereby dismissed, and the Defendant currency in account no. 030008753 is hereby forfeited to the United States of America. The United States Marshals Service is directed to dispose of the Defendant currency in account no. 030008753 in the manner prescribed by law.

DONE AND ORDERED in Chambers in Jacksonville, Florida, this 5 day of February, 1992.

John H. Moore II /sig/
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

-vs- CASE NO. 91-1013 CIV-J-12

$8,985,427.20 IN UNITED STATES CURRENCY, MORE OR LESS, PLUS INTEREST, AT THE AMERICAN NATIONAL BANK OF FLORIDA, JACKSONVILLE, FLORIDA, ACCOUNT NO. 408004951-01,
Defendant.
_____/

ORDER DISMISSING CLAIMS AND DIRECTING ENTRY OF FINAL JUDGMENT OF FORFEITURE

This is one of eight separate cases instituted in this Court by the United States pursuant to 21 U.S.C. § 881(a)(6) seeking the forfeiture of funds deposited in foreign banks by, or for the account of, Jose Gonzalo Rodriguez-Gacha, now deceased and alleged to be a former member of the Medellin Cartel. The complaint, including an attached affidavit, alleges that the deposits involved were derived from drug trafficking in the United States.

The complaint in this case seeks the forfeiture of Rodriguez-Gacha funds which were seized in Switzerland by Swiss authorities and were then transferred to the United States for commencement of these proceedings. The remaining cases pending or lately pending in this Court involve Rodriguez-Gacha accounts in the United Kingdom or in Hong Kong, and those cases involve jurisdictional issues not present here; the funds involved in this case are within

the United States and, more particularly, within the Middle District of Florida.

The funds at issue in this case were placed in four separate accounts in three separate banks in Zurich, Switzerland:

Bank	Account No.	Name of Account	Amount
Dai-Ichi Kangyo	5611	Moorgate Securities, Ltd.	$ 724,589.90
Dai-Ichi Kangyo	5496	First Interstate, Ltd.	577,912.60
Mitsubishi Bank	2023	Haverstock Ltd.	2,962,768.85
Swiss Bank Corp.	In the name of	Banco Ganadero	4,720,155.85
	Total		$8,895,427.20

No claim has been made to the funds transferred here by the Swiss authorities from the fourth account in the name of Banco Ganadero, and a partial default judgment has previously been entered forfeiting the $4,720,155.85 from that account to the United States (Doc. 15). With respect to the remaining accounts, three claimants have appeared through counsel and have filed both claims and answers (Doc. 3, 4, 5, 7, 8 and 9).

The first claimant is Dolores Rodriguez De Castro who asserts that she "... is the signatory and claimant of Account No. 5611-8, in the name of Moorgate Securities, Ltd. in the Dai-Ichi Kangyo Bank, Zurich," and that she "... acquired these funds through numerous years in her legitimate large scale cattle business." (Verified Claim, Doc. 3, para. 7 & 8, p. 2). The Government alleges that Dolores Rodriguez De Castro is the sister of Rodriguez-Gacha (Reply of the United States, Doc. 23, p. 4).

The second claimant is Anibal Castro Rodriguez who asserts that he "... is the signatory and claimant of Account No. 2023/00,08 in the name of Haverstock Ltd. in Mitsubishi Bank of Zurich and Account No. 2023/01,06 in the name of Haverstock Ltd. in Mitsubishi Bank of Zurich," and that such accounts "... are part of the funds he obtained through his legitimate work since the age of 12, including his large scale cattle business." (Verified Claim, Doc. 4, para. 7 & 8, p. 2). The Government alleges that Anibal Castro

Rodriguez and Dolores Rodriguez De Castro are husband and wife so that Castro Rodriguez was the brother-in-law of Rodriguez-Gacha. (Reply of the United States, Doc. 23, p. 4).

The third claimant is Sara Edilma Pimentel De Alvarez who asserts that she "... is the signatory and claimant of Account No. 5496-4 in the name of First Interstate Ltd. at Dai-Ichi Kangyo Bank, Zurich," and that such account represents "... funds she obtained through approximately a 20 year period of legitimate and extensive real estate business, the purchase and sale of duty free general merchandise and the purchase and sale of emeralds." (Verified Claim, Doc. 5, para. 7 & 8, p.2). The Government alleges that Sara Edilma Pimentel De Alvarez is the mother of Gladys Edilma Alvarez Pimentel who was the common law wife of Rodriguez-Gacha, i.e., the claimant was mother-in-law to Rodriguez-Gacha (Reply of the United States, Doc. 23, p.4).

Each of the claims and each of the answers was filed by counsel without personal endorsement or verification by any of the claimants, and each of the claims state that the respective claimants are citizens and residents of Colombia.

By superseding indictment returned on November 22, 1991 in the case of *United States of America v. Pablo Escobar-Gaviria*, Case No. 89-29 CR-J-16, still pending in this court,[1] each of the claimants was charged in that indictment with the commission of a conspiracy offense in violation of Title 21, United States Code, Section 841.[2]

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[1]The third superseding indictment consisted of ten counts and named a total of 26 defendants.

[2]The Court takes judicial notice of that indictment and the docket of the case which reflects that unexecuted capias warrants have been issued and are presently outstanding with respect to each of the claimants involved in this case. (See Docs. 1268, 1271 and

More specifically, the indictment charges that from 1974 through November 1991, in the Middle District of Florida and elsewhere, the three claimants knowingly and willfully conspired with Jose Gonzalo Rodriguez-Gacha and others to distribute five kilograms or more of cocaine in violation of Title 21, United States Code, Section 841. Then, Overt Act 173 alleges that from the end of 1984 through late 1989 at Rodriguez-Gacha's direction, the claimant Anibal Castro Rodriguez and thus [sic] opened bank accounts in various countries on behalf of Rodriguez-Gacha and caused proceeds from his cocaine smuggling operation to be deposited in those accounts, including accounts in Switzerland. Overt Act 215 alleges that in or about mid July 1987 the claimant Sara Edilma Pimentel De Alvarez became a signatory on bank accounts in the name First Interstate, Ltd. at the Dai-Ichi Kangyo Bank into which proceeds of Rodriguez-Gacha's cocaine smuggling operation were deposited. Overt Act 220 alleges that in or about July 1988 the claimant Dolores Rodriguez De Castro became a signatory on bank accounts at the Union Bank of Switzerland in the name of Xyaer International in which large sums of money were deposited which were proceeds of Rodriguez-Gacha's cocaine smuggling operation.[3]

Citing *United States v. One Parcel of Real Estate, etc.*, 868 F.2d 1215 (11th Cir. 1989) the Government has moved

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1274 in Case No. 89-29 CR-J-16). Judicial notice of such records is appropriate. See *St. Louis Baptist Temple, Inc. v. Federal Deposit Insurance Corporation*, 605 F.2d 1169, 1172 (10th Cir. 1979), cited with approval in *Cash Inn of Dade, Inc. v. Metropolitan Dade County*, 938 F.2d 1239, 1243 (11th Cir. 1991).

[3]The account identified in Overt Act 220 is not the same account involved in this case. However, Exhibit A to the indictment, expressly incorporated by reference in Overt Act 173, specifically describes each of the accounts in Switzerland as identified in the complaint in this case.

to dismiss each of the claims and for entry of a final judgment of forfeiture pursuant to the "fugitive disentitlement doctrine" as applied in that decision. It appears that the Government's motion is correct and that the decision of the Court of Appeals in *United States v. One Parcel of Real Estate* is squarely on point. Dealing with a virtually identical factual situation, the Court said:

> "The *in rem* forfeiture action against the defendant real property is unquestionably related to the applicant's indictment for drug trafficking. By fleeing from justice appellant has disentitled himself from invoking the judicial process in the civil forfeiture action. Thus, the district court was correct in dismissing appellant's claim."

Id. 868 F.2d at 1216. See also *Schuster v. United States*, 765 F.2d 1047 (1985) in which the fugitive disentitlement doctrine was applied to a claimant, like those in this case, who was out of the United States at the time of indictment but was deemed to be in flight from justice by not appearing for approximately three years.

The claimants' only response to the Government's argument is that the United States should not be permitted to avail itself of the fugitive disentitlement doctrine "... where it has indicted the claimants for the purpose of obtaining an unfair advantage in the civil forfeiture cases." (Claimants' Opposition Memorandum, Doc. 17, p. 4). However, no authority is cited in support of that contention; and, the law is clear that as long as a prosecutor has probable cause to believe that the accused has committed an offense, the decision to prosecute generally rests entirely in his discretion. *Wayte v. United States*, 470 U.S. 598, 607, 105 Sup. Ct. 1524, 1531 (1985). The return of the indictment by the grand jury is prima facia [sic] evidence of probable cause; and, absent any claim that the indictment was sought for an unconstitutional purpose, the decision to prosecute is not subject to judicial scrutiny. Moreover, even if such a

claim was made on constitutional grounds, the only proper forum in which to present that claim would be the criminal proceeding, not in this civil case.

It follows that the Government's motion (Doc. 12) is GRANTED, the verified claims and answers of the claimants in this action are stricken, and the Clerk is directed to enter final judgment of forfeiture by default with respect to all of the remainder of the defendant currency or *res* not previously included within the partial default judgment entered January 29, 1992 (Doc. 15). The motion of the claimants for oral argument (Doc. 18) is DENIED.

IT IS SO ORDERED.

DONE and ORDERED at Jacksonville, Florida, this 27th day of August, 1992.

Wm. Terrell Hodges /sig/
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA,
Plaintiff,

-vs- CASE NO. 92-1282 Civ-J-10

CERTAIN FUNDS IN LUXEMBOURG CONTAINED IN ACCOUNT NOS. 055-561 (IN THE NAME OF FIRST INTERSTATE, LTD.); 055-556 (IN THE NAME OF UNION ENTERPRISES, LTD.); 055-560 (IN THE NAME OF HAVERSTOCK, LTD.); 055-335 (IN THE NAME OF FIDUCORP, S.A.) LOCATED AT BFG LUXEMBOURG,
Defendants.
_____/

UNITED STATES OF AMERICA,
Plaintiff,

-vs- CASE NO. 92-1286 Civ-J-10

CERTAIN FUNDS IN LUXEMBOURG CONTAINED IN ACCOUNT NO. 25094 (IN THE NAME OF FIDUCORP, S.A.) LOCATED AT BANQUE HAPOALIM, LUXEMBOURG,
Defendant.
_____/

UNITED STATES OF AMERICA,
Plaintiff,

-vs- CASE NO. 92-1290 Civ-J-10

CERTAIN FUNDS IN LUXEMBOURG CONTAINED IN ACCOUNT NOS. 70113 (IN THE NAME OF UNION ENTERPRISES, LTD.); 75009 (IN THE NAME OF XAYAR INTERNATIONAL CORP.); 69270 (IN THE NAME OF TRANSCONTINENTAL TRADERS) LOCATED AT DRESDNER BANK, LUXEMBOURG,

Defendants.

_____/

UNITED STATES OF AMERICA,

Plaintiff,

-vs- CASE NO. 92-1291 Civ-J-10

CERTAIN FUNDS IN LUXEMBOURG CONTAINED IN ACCOUNT NOS. 938668 (IN THE NAME OF MOORGATE SECURITY, LTD.); 952944 (IN THE NAME OF HAVERSTOCK, LTD.); 954297 (IN THE NAME OF UNION ENTERPRISES, LTD.); 954296 (IN THE NAME OF FIRST INTERSTATE, LTD.) LOCATED AT UNION BANK OF SWITZERLAND, LUXEMBOURG,

Defendants.

_____/

UNITED STATES OF AMERICA,

Plaintiff,

-vs- CASE NO. 92-1292 Civ-J-10

CERTAIN FUNDS IN LUXEMBOURG CONTAINED IN ACCOUNT NOS. 05189090 (IN THE NAME OF

HAVERSTOCK, LTD.); 05188872
(IN THE NAME OF UNION ENTERPRISES,
LTD.); 05188981 (IN THE NAME OF
FIRST INTERSTATE, LTD.); 05162860
(IN THE NAME OF FIDUCORP, S.A.);
05211796 (IN THE NAME OF WATFORD
INVESTMENTS, LTD.) LOCATED AT BANQUE
PARIBAS, LUXEMBOURG,

Defendants.

_____/

ORDER

Pursuant to the Order (91-598, Doc. 66; 91-646, Doc. 81; 92-1282, Doc. 31; 92-1286, Doc. 10; 92-1290, Doc. 36; 92-1291, Doc. 36; 92-1292, Doc. 38) entered 3 March 1993, and the Government's response (91-598, Doc. 77; 91-646, Doc. 86; 92-1282, Doc. 35; 92-1286, Doc. 12; 92-1290, Doc. 40; 92-1291, Doc. 40; 92-1292, Doc. 42) thereto:

1. Claimants' motions (91-598, Doc. 72; 91-646, Doc. 83; 92-1282, Doc. 33; 92-1290, Doc 38; 92-1291, Doc. 38; 92-1292, Doc. 40) to dismiss the complaint are DENIED.

2. Claimant De Alvarez' motions (91-646, Docs. 7 & 61) to dismiss the complaint are DENIED.

Furthermore, upon due consideration, the Government's motion (91-646, Doc. 67) to dismiss Claimant De Alvarez' claim and for entry of final forfeiture judgment is GRANTED and Claimant De Alvarez' claim is hereby dismissed and the Government shall have ten (10) days to file a form judgment of forfeiture in Case No. 91-646-Civ-J-10.

IT IS SO ORDERED.

DONE AND ORDERED at Jacksonville, Florida, this 25th day of March, 1993.

Wm. Terrell Hodges /sig/
UNITED STATES DISTRICT JUDGE

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUN 20 1994
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEAL

FOR THE ELEVENTH CIRCUIT

No. 92-2294

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CERTAIN FUNDS IN THE UNITED KINGDOM
CONTAINED IN ACCOUNT NO. 01042000,
(IN THE NAME OF FIDUCORP), ET AL.,
Defendant,

SARA EDILMA PIMENTEL DE ALVAREZ,
Claimant-Appellant.

No. 92-2295

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CERTAIN FUNDS IN THE UNITED KINGDOM
CONTAINED IN ACCOUNT NO. 030008753
(IN THE NAME OF HAVERSTOCK), ET AL.,
Defendant,

ANIBAL CASTRO RODRIGUEZ,
Claimant-Appellant.

NO. 92-2940

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

U.S. CURRENCY, $8,985,427.20, MORE OR LESS, PLUS INTEREST, AT THE AMERICAN NATIONAL BANK OF FLORIDA, JACKSONVILLE, FLORIDA, ACCOUNT NO. 408004951-01,

Defendant,

DOLORES RODRIGUEZ DE CASTRO,
ANIBAL CASTRO RODRIGUEZ, and
SARA EDILMA PIMENTEL DE ALVAREZ,

Claimants-Appellants.

No. 93-2424

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CERTAIN FUNDS, IN THE ISLE OF MAN CONTAINED IN A CERTIFICATE OF DEPOSIT (IN THE NAME OF FIRST INTERSTATE LTD.) ET AL.,

Defendants,

SARA EDILMA PIMENTEL DE ALVAREZ,

Claimant-Appellant,

HILDA RODRIGUEZ DE CABRERA, AND
SAADIA CONSTANZA ALVAREZ PIMENTEL,

Claimants.

On Appeal from the United States District Court for the Middle District of Florida

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Before: MORGAN, HILL and FAY, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:
Judge Fay /sig/
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

FILED
JAN 11 1995

No. 94-636 and 94-943

In the Supreme Court of the United States

OCTOBER TERM, 1994

SARA ALVAREZ, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

HILDA RODRIGUEZ, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

DEBORAH WATSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district court properly applied the fugitive disentitlement doctrine to bar petitioners from contesting civil forfeiture proceedings under the circumstances of this case.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-636

SARA ALVAREZ, ET AL., PETITIONERS[1]

v.

UNITED STATES OF AMERICA

No. 94-943

HILDA RODRIGUEZ, ET AL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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[1] The caption in No. 94-636 lists five petitioners, including Hilda Rodriguez and Saadia Pimentel, who are also the petitioners in No. 94-943. Neither Rodriguez nor Pimentel filed a claim in any of the four cases addressed by the petition in No. 94-636. See 94-636 Pet. App. 1a-2a (court of appeals captions); but see *id.* at 24a (caption to order denying rehearing in C.A. No. 93-2424).

OPINIONS BELOW

The opinions of the court of appeals (94-636 Pet. App. 1a-3a; 94-943 Pet. App. 1a-2a) are unreported, but the judgments are noted at 20 F.3d 1173-1174 (Table) and 35 F.3d 577 (Table), respectively. The orders of the district court (94-636 Pet. App. 4a-22a; 94-943 Pet. App. 3a-4a; App., *infra*, 1a-5a) are unreported.

JURISDICTION

The judgments of the court of appeals were entered on April 13, 1994, in No. 94-636 and on September 1, 1994, in No. 94-943. Petitions for rehearing in the cases involved in No. 94-636 were denied on June 20, 1994. 94-636 Pet. App. 23a-24a. The petitions for a writ of certiorari were filed on August 29, 1994 (docketed as of October 11, 1994), in No. 94-636 and on November 23, 1994, in No. 94-943. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States filed several civil forfeiture actions (including the five at issue in these two petitions) against funds held in certain foreign bank accounts for which petitioners were the signatories. The forfeiture actions alleged that the funds were subject to forfeiture pursuant to 21 U.S.C. 881(a)(6), as proceeds of narcotics trafficking by the so-called Medellin Cartel, and pursuant to 18 U.S.C. 981(a)(1)(A), as funds involved in money laundering transactions that violated 18 U.S.C. 1956(a)(1). In the cases at issue here, petitioners answered the complaints, claimed some of the funds, and moved to dismiss on the ground that the district court lacked *in rem* jurisdiction over the funds. The United States moved to dismiss petitioners' claims on the ground that petitioners were fugitives from justice in a

related criminal prosecution. The district court entered default judgments for the government as to the unclaimed funds, denied petitioners' motions to dismiss the complaints with respect to funds they claimed, granted the government's motions to dismiss petitioner's claims, and entered orders of forfeiture against all of the funds. The court of appeals affirmed.

1. In February 1989, a grand jury indicted a number of leading members of the Medellin Cartel, including Jose Gonzalo Rodriguez-Gacha, Pablo Escobar, Jorge and Fabio Ochoa, and 26 others, on various charges related to the importation and distribution of cocaine. Among other counts, the indictment sought criminal forfeiture of the proceeds of Rodriguez-Gacha's cocaine trafficking enterprise. In December 1989, Rodriguez-Gacha was shot and killed by Colombian law enforcement officers. In January 1990, the grand jury returned a superseding indictment charging the three primary successors-in-interest to the Rodriguez-Gacha organization (Rogelio Anibal Castro-Rodriguez, Gladys Edilma Alvarez-Pimentel, and Fernando Suarez-Pinzon) with various criminal violations springing from their activities in concealing the organization's narcotics proceeds.

In November 1991 the grand jury returned a third superseding indictment, adding petitioners to the list of those charged with conspiracy to distribute and import cocaine into the United States, in violation of 21 U.S.C. 841 and 952, and with concealing the narcotics proceeds of the Rodriguez-Gacha organization. The conspiracy count alleged that petitioners, all of whom were related in one way or another to Rodriguez-Gacha, opened or acted as signatories for bank accounts into which narcotics proceeds were deposited, and over which Rodriguez-Gacha or his successors in the conspiracy

retained ultimate control.[2] Petitioners did not appear for arraignment on the charges set out in the third superseding indictment.

2. Following the original indictment authorities in the United Kingdom (including the Isle of Man), Switzerland, and Hong Kong, acting at the request of the United States, froze various bank accounts in those countries into which proceeds from Rodriguez-Gacha's narcotics activities had been deposited.[3] The funds in the Swiss accounts were later transferred to an account maintained by the Drug Enforcement Administration (DEA) at a bank in Jacksonville, Florida. See 94-636 Pet. App. 14a-15a.

In August 1991 the United States filed civil forfeiture actions against the funds at issue in these cases. The complaints alleged that the funds were proceeds of the Rodriguez-Gacha organization's narcotics dealings, and therefore subject to forfeiture under 21 U.S.C. 881(a)(6), and that they had been involved in money laundering transactions in violation of 18 U.S.C. 1956, and were therefore forfeitable under 18 U.S.C. 981(a)(1)(A). Petitioners answered the complaints and filed claims to some

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[2] Petitioner Sara Edilma Pimentel de Alvarez is the mother of Gladys Edilma Alvarez-Pimentel, Rodriguez-Gacha's wife and one of the successors to his organization. Petitioner Anibal Castro Rodriguez is the husband of Rodriguez-Gacha's sister and the father of Rogelio Anibal Castro-Rodriguez, another of Rodriguez-Gacha's successors. Petitioner Dolores Rodriguez de Castro is Rodriguez-Gacha's sister, Anibal Castro Rodriguez's wife, and Rogelio Castro-Rodriguez's mother. Petitioner Hilda Rodriguez de Cabrera is also Rodriguez-Gacha's sister. Petitioner Saadia Constanza Alvarez Pimentel is Rogelio Rodriguez-Castro's wife and Gladys Edilma Alvarez-Pimentel's sister.

[3] The United Kingdom and Swiss accounts (at issue in No. 94-636) were frozen in November 1989. The Hong Kong accounts (at issue in No. 94-943) were frozen in July 1991.

of the defendant funds, alleging that the claimed funds were acquired through various legitimate business transactions.[4]

The district court entered judgment for the United States on funds to which petitioners asserted no claim. See, *e.g.*, 94-636 Pet. App. 5a n.1, 15a. As to the contested funds, petitioners moved to dismiss the complaints against the United Kingdom and Hong Kong funds on the ground that in each case the district court lacked jurisdiction over the defendant res. Petitioners deposed the affiant to the forfeiture complaints—a DEA agent involved in the investigation of the movement and laundering of the Rodriguez-Gacha organization's narcotics proceeds—but petitioners neither appeared for depositions noticed by the government nor produced documents in response to the government's requests.

After the grand jury named petitioners in the third superseding indictment returned in November 1991, the government moved to dismiss petitioners' claims in the civil forfeiture proceedings on the ground that petitioners' failure to appear for arraignment under that indictment justified invocation of the fugitive disentitlement doctrine to bar petitioners from defending against the forfeiture actions. In response, petitioners con-

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[4] Petitioner Sara Alvarez filed claims to certain funds at the Bank of Credit and Commerce International (BCCI), Park Lane, London; to certain of the Swiss funds transferred to the DEA's account in Florida; and to the funds in the Isle of Man account. See 94-636 Pet. App. 5a, 16a, 22a. Petitioner Anibal Rodriguez claimed certain funds at BCCI, Edgware Road, London, and certain of the Swiss funds. *Id.* at 9a-10a, 15a. Petitioner Dolores Castro claimed certain of the Swiss funds. *Id.* at 15a. Petitioners in No. 94-943, Saadia Pimentel and Hilda Rodriguez, filed claims to certain funds in the Hong Kong accounts. See 94-943 Pet. App. 3a-4a.

tended that the district court should not apply the disentitlement doctrine because the government indicted them in bad faith in an effort to circumvent further proceedings in the civil forfeiture cases. See 94-636 Pet. App. 7a n.2, 11a n.2, 18a; Claimant's Opp. Memo. to Gov't's Mot. to Dismiss in C.A. No. 93-3476, at 7-9; see also note 8, *infra*.

The district court denied petitioners' motions to dismiss. The court noted that petitioners' filings indicated that they were aware of the indictments against them, yet had voluntarily failed to appear for arraignment. Relying on *United States* v. *7707 S.W. 74th Lane*, 868 F.2d 1214, 1216 (11th Cir. 1989), the court held that each petitioner had, "by her own actions as a fugitive from justice, waived her right to object to [the court's] *in rem* jurisdiction" and "rendered [each] case essentially an 'uncontested action.'" 94-636 Pet. App. 7a, 12a, citing *7707 S.W. 74th Lane*, 868 F.2d at 1217. The court observed that if petitioners were not fugitives, "a substantial objection to *in rem* jurisdiction would be at issue" in those cases involving funds still located outside the United States. 94-636 Pet. App. 7a, 12a. The court rejected, however, petitioners' contention that the government should be prevented from invoking the fugitive disentitlement doctrine because it had indicted them for the purpose of obtaining an unfair advantage in the forfeiture proceedings. The court held that any claim of improper prosecutorial motive could be raised only in the criminal proceeding, to which petitioners had refused to submit. 94-636 Pet. App. 7a n.2, 11a n.1, 18a-19a. The court therefore granted the government's motion to dismiss petitioners' claims, and entered final judgments of forfeiture. *Id.* at 7a-8a, 12a, 19a, 22a; 94-943 Pet. App. 3a-4a.

3. The court of appeals affirmed, in summary reliance on its earlier decision in *United States* v. *7707 S.W. 74th Lane, supra.* 94-636 Pet. App. 1a-3a; 94-943 Pet. App. 1a-2a.

ARGUMENT

Petitioners challenge the application of the fugitive disentitlement doctrine to the circumstances of the civil forfeiture proceedings here, in which, among other things, petitioners claim that "the property is located wholly outside the United States," "the claimants are neither residents nor citizens of the United States," and the indictment under which petitioners have failed to appear was filed only after petitioners objected to the civil forfeiture. 94-636 Pet. i; 94-943 Pet. i. That fact-specific challenge does not warrant this Court's review.

1. This Court has consistently held that a defendant's status as a fugitive "disentitles [him] to call upon the resources of the Court for the determination of his claims." *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970); see *Ortega-Rodriguez* v. *United States*, 113 S. Ct. 1199, 1203-1204 (1993); *Estelle* v. *Dorrough*, 420 U.S. 534, 537 (1975); *Bonahan* v. *Nebraska*, 125 U.S. 692 (1887); *Smith* v. *United States*, 94 U.S. 97 (1876); see also *United States* v. *Sharpe*, 470 U.S. 675, 681 n.2 (1985); *id.* at 721-723 (Stevens, J., dissenting). This "longstanding and established principle of American law" (*Dorrough*, 420 U.S. at 537) is based largely on the equitable principle that a litigant should not be entitled to invoke the protective processes of the law while simultaneously flouting its authority as a fugitive from justice. See, *e.g.*, *Ortega-Rodriguez*, 113 S. Ct. at 1206; *United States ex*

rel. Bailey v. *United States Commanding Officer*, 496 F.2d 324, 326 (1st Cir. 1974).[5]

The courts of appeals have applied the *Molinaro* disentitlement doctrine to bar a wide variety of civil claims pursued by fugitives from criminal justice. See, *e.g.*, *Schuster* v. *United States*, 765 F.2d 1047 (11th Cir. 1985) (review of tax assessment); *Conforte* v. *Commissioner*, 692 F.2d 587 (9th Cir. 1982) (same); *Doyle* v. *United States Dep't of Justice*, 668 F.2d 1365 (D.C. Cir. 1981) (Freedom of Information Act proceeding), cert. denied, 455 U.S. 1002 (1982); *Broadway* v. *City of Montgomery*, 530 F.2d 657 (5th Cir. 1976) (suit for damages and injunctive relief); *Bailey*, 496 F.2d at 326 (challenge to regulation); see also *Conforte* v. *Commissioner*, 459 U.S. 1309, 1312 (1983) (Rehnquist, Circuit Justice) (courts of appeals have applied disentitlement doctrine to civil proceedings "on a

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[5] This Court has articulated a number of rationales for the fugitive disentitlement rule. First, the rule is supported by enforceability concerns. As the Court explained in *Smith* v. *United States*, 94 U.S. at 97, it is "clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render." Second, the rule rests "in part on a 'disentitlement' theory that construes a defendant's flight during the pendency of his appeal as tantamount to waiver or abandonment." *Ortega-Rodriguez*, 113 S. Ct. at 1204. Third, the rule serves a deterrent function by "discourag[ing] the felony of escape and encourag[ing] voluntary surrenders." *Ibid.*, quoting *Estelle* v. *Dorrough*, 420 U.S. at 537. Finally, the Court has indicated that dismissal of a fugitive's appeal "advances an interest in efficient, dignified appellate practice," and thus may be appropriate where flight "operates as an affront to the dignity of the court's proceedings." *Ortega-Rodriguez*, 113 S. Ct. at 1204-1205, 1207.

number of occasions" and Court has previously denied certiorari in that type of case).

Like the court below, see *United States* v. *7707 S.W. 74th Lane*, 868 F.2d 1214, 1216-1217 (1989), the Second, Ninth, and Tenth Circuits have specifically applied the disentitlement doctrine to hold that fugitives may not avail themselves of the judicial process to challenge the forfeiture of assets acquired in connection with their criminal activity. *United States* v. *Timbers Preserve, Routt County, Colorado*, 999 F.2d 452, 453-455 (10th Cir. 1993); *United States* v. *Eng*, 951 F.2d 461, 464-467 (2d Cir. 1991); *United States* v. *$45,940 in United States Currency*, 739 F.2d 792, 797-798 (2d Cir. 1984); *United States* v. *$129,374 in United States Currency*, 769 F.2d 583, 586-587 (9th Cir. 1985), cert. denied *sub nom. Geiger* v. *United States*, 474 U.S. 1086 (1986). In addition, the Third Circuit has indicated that it would apply the doctrine in an appropriate forfeiture case. *United States* v. *Contents of Accounts Numbers 3034504504 & 144-07143 at Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 971 F.2d 974, 986 n.9 (1992), cert. denied, 113 S. Ct 1580 (1993).

2. In the courts below, petitioners challenged neither the existence of the fugitive disentitlement doctrine nor its general applicability to civil forfeiture cases. See, *e.g.*, Reply Br. of Pet. Alvarez in C.A. No. 92-2294, at 1 ("The Appellant has never taken the position that a court has no discretion to dismiss a forfeiture case because the Claimant is a fugitive.").[6] Rather, petitioners focused on

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[6] Petitioners were all represented in the proceedings below by the same attorney (who is also their counsel of record in this Court), and with some exceptions (see, *e.g.*, pages 11-12, *infra*) they filed separate but virtually identical papers in the various district court and appellate proceedings.

the merits of their argument that the district court lacked *in rem* jurisdiction over funds in accounts outside the United States, on their contention that the United States indicted them in bad faith, and on the district court's alleged failure to respect "the discretionary nature of the [disentitlement] doctrine" in applying it to petitioners' particular circumstances. See, *e.g.*, *id.* at 1-4, 5-6; Br. of Pet. Alvarez in C.A. No. 92-2294, at 14 (summary of argument); Supp. Br. of Pet. Alvarez in C.A. No. 92-2294 (addressing merits of *in rem* jurisdictional issue).

The petitions in these cases are similarly limited to challenging application of the disentitlement doctrine to what petitioners characterize as the "extraordinary circumstances" of their case. 94-636 Pet. 9; see also *id.* at i, 7-9 (attacking court of appeals' "sweeping" application of doctrine), 10-12 (arguing that jurisdictional questions were sufficiently substantial to require consideration), 12-14 (suggesting government abuse and bad faith); 94-943 Pet. 6 (summarizing and incorporating same arguments). Particularly in view of the "limited * * * scope" of this Court's review of rules, like those falling under the rubric of fugitive disentitlement, "adopted by the courts of appeals in their supervisory capacity," *Ortega-Rodriguez*, 113 S. Ct. at 1205, petitioners' fact-bound contentions do not merit further review.

3. In any event, petitioners' arguments lack merit. Although the petition in No. 94-636 notes in passing (at 9) that petitioners "have not fled from custody or from the United States," neither below nor in this Court have petitioners seriously challenged the district court's conclusion (see, *e.g.*, Pet. App. 6a, 18a) that they are "fugitives" for purposes of the disentitlement doctrine. See also *United States* v. *Eng*, 951 F.2d at 464-465; *United States* v. *7707 S.W. 74th Lane*, 868 F.2d at 1215-

1216; *Schuster* v. *United States*, 765 F.2d 1047, 1050-1051 (11th Cir. 1985); *United States* v. *$45,940 in United States Currency*, 739 F.2d at 796. Petitioners have relied instead on speculative allegations that the government acted in bad faith in seeking the separate criminal indictment to which petitioners have refused to respond. See, *e.g.*, 94-636 Pet. App. 18a ("[Petitioners'] only response * * * is that the United States should not be permitted to avail itself of the fugitive disentitlement doctrine '. . . where it has indicted the claimants for the purpose of obtaining an unfair advantage in the civil forfeiture cases.'").

Those allegations are unfounded. The United States has a compelling interest in bringing to justice all those who have contributed to the illicit and tremendously damaging operations of the Rodriguez-Gacha organization and the rest of the Medellin drug cartel. The fact that some of those involved in the organization's financial operations may have been identified or indicted later than its ringleaders, and after the identification of forfeitable property, casts no doubt on the existence of legitimate grounds for prosecution. And absent a significant threshold showing of unconstitutional motive, the decision to indict is not open to review by the courts. See *Wayte* v. *United States*, 470 U.S. 598, 607-608 (1985). In any event, as the district court correctly held, even if petitioners could suggest unconstitutional grounds for the decision to indict them, "the only proper forum in which to present that claim would be the criminal proceeding," not a civil forfeiture case. 94-636 Pet. App. 19a; see also *id.* at 7a n.2, 11a n.1.

Petitioners' only other argument for avoiding application of the disentitlement doctrine is their claim that they raised a substantial objection to the district court's *in rem* jurisdiction, and that that objection should have

been litigated on the merits. See 94-636 Pet. 8-9, 11-12; 94-943 Pet. 6. As petitioners concede (94-636 Pet. 4 n.2), they did not challenge jurisdiction in the district court with respect to any of the funds transferred to the DEA's Florida account by the government of Switzerland. Whatever the merits of their current contention (*id.* at 4) that *in rem* jurisdiction should have been determined at the time the forfeiture action against the funds was filed, petitioners have therefore waived any jurisdictional claim with respect to a substantial portion of the funds at issue in these cases.[7] See, *e.g.*, 94-636 Pet. App. 6a (objection to *in rem* jurisdiction may be waived); *Cactus Pipe & Supply Co.* v. *M/V Montmartre*, 756 F.2d 1103, 1107 (5th Cir. 1985) (same).

As to those cases in which petitioners did question jurisdiction, in No. 94-943 the district court ordered the government to address the issue on the merits. The government responded in part by producing documentation demonstrating that the defendant funds had been frozen by the Hong Kong authorities at the United States' request, and would be available for appropriate process to enforce a final forfeiture order entered by the

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[7] Ignoring interest, the Swiss funds subject to the government's original complaint amounted to approximately $8.9 million. 94-636 Pet. App. 15a. Of that total, the district court entered an unchallenged default judgment with respect to some $4.7 million, which is no longer at issue. *Ibid.* By way of comparison, the defendant funds held at BCCI Park Lane, London (see note 4, *supra*) totaled approximately $575,000, of which petitioners failed to claim approximately $143,000. See 94-636 Pet. App. 5a n.1; U.S. Opp. to Mot. for Stay Pending Appeal in C.A. No. 92-2294, at 4 (served Sept. 9, 1992). Overall we are informed that the complaints in these cases sought forfeiture of approximately $16.9 million, of which petitioners failed to claim approximately $5.2 million.

district court. See Gov't Br. in C.A. No. 93-3476, at 5-6; see also *id.* at 34-50 (responding at length to petitioners' jurisdictional arguments). The district court entered the judgment of forfeiture only after accepting the government's jurisdictional submission. App., *infra*, 4a-5a.[8]

In two of the cases involved in No. 94-636 the district court expressed concern over the jurisdictional issue, but declined to resolve that issue because of the court's application of the disentitlement doctrine. 94-636 Pet. App. 7a, 12a; compare *id.* at 14a-19a (Swiss funds), 22a (no discussion). The court's concern, however, was

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[8] This order is not included in the appendix to the petition in No. 94-943, although it is cited in the final judgment reprinted there. 94-943 Pet. App. 4a. After the district court granted the government leave to file an amended complaint (made necessary because of movement of the defendant funds, originally held at BCCI's Hong Kong affiliate and at Dresdner Bank Hong Kong, to receivership accounts at a new bank) in March 1993, petitioners filed new claims but failed to file a new answer, as required by Rule C(6) of the Supplemental Rules for Admiralty and Maritime Claims. Petitioners also failed to respond to the United States' subsequent supplemental motion to dismiss their claims under the fugitive disentitlement doctrine. See App., *infra*, 2a & n.1. After the court granted the government's motion on November 1, 1993, *id.* at 4a-5a, petitioners asked the court to reconsider and alter its judgment. The court granted that motion to the extent of reconsidering its conclusion in light of the arguments contained in an earlier response to the government's first motion to dismiss, but declined to alter or amend the judgment. *Id.* at 2a. Because it granted the government's motion on the merits, the court had no occasion to hold petitioners to their failure to respond to the supplemental motion to dismiss, or to rule on the effect of their procedural default under the Admiralty Rules. Those defaults provide, however, separate and adequate grounds for the judgment below in No. 94-943. See Gov't Br. in C.A. No. 93-3476, at 30-34.

misplaced. This Court has made clear that *in rem* jurisdiction depends on the district court's "actual *or constructive* control of the res." *Republic Nat'l Bank* v. *United States*, 113 S. Ct. 554, 559 (1992) (emphasis added). In these cases, as in the case of the Hong Kong accounts at issue in No. 94-943, the United States requested and received cooperation from the relevant foreign governments in freezing the defendant funds before initiation of forfeiture proceedings, under agreements providing for such cooperation with respect to the seizure and forfeiture of drug trafficking proceeds. See Agreement Concerning the Investigation of Drug Trafficking Offences and the Seizure and Forfeiture of Proceeds and Instrumentalities of Drug Trafficking, Feb. 9, 1988, U.S.-U.K., T.I.A.S. No. 11,649; Agreement Concerning Confiscation and Forfeiture of Proceeds and Instrumentalities of Drug Trafficking, Nov. 23, 1990, U.S.-H.K.; see also Treaty on Mutual Legal Assistance in Criminal Matters, May 25, 1973, U.S.-Switz., 27 U.S.T. 2019. The funds were therefore at all times under the constructive control of the district court for jurisdictional purposes, and available for execution of its final judgments in accordance with those treaties and the laws of the relevant jurisdictions.[9]

In any event, whatever jurisdictional questions might have existed at the time these actions were filed,

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[9] Indeed, as petitioners conceded below (see, *e.g.*, Pet. Alvarez's Supp. Br. in C.A. No. 92-2294, at 19 n.9), the United Kingdom has already complied with default judgments entered in these cases by splitting forfeited proceeds with the United States. And, as noted above, the Swiss government turned the funds at issue over to United States authorities pending disposition of the forfeiture proceedings. 94-636 Pet. App. 15a. There is therefore nothing to support, and much to refute, any concern that the funds in these cases were outside the jurisdictional reach of the district court.

petitioners concede that 28 U.S.C. 1355 (1988 & Supp. V 1993) now grants district courts "subject matter jurisdiction over actions brought for any forfeiture, specifically including * * * forfeiture of property outside the United States." 94-636 Pet. 13. Section 1355(b)(2) (Supp. V 1993) refers even more specifically to forfeitable property that "has been detained or seized pursuant to legal process or competent authority of a foreign government," as in each of the cases at issue under these petitions. Whether or not that provision, enacted in 1992 by the Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, tit. XV, § 1521, 106 Stat. 4062, applies retroactively to this case, see *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1502 (1994), citing *Republic Nat'l Bank*, 113 S. Ct. at 565 (Thomas, J., concurring in part and in the judgment), it resolves the question for the future. Thus, to the extent that petitioners' jurisdictional point is actually presented on the facts of these cases, it is of little continuing importance. Neither the argument itself nor the district court's failure to consider it in some of the cases below merits any further review.

4. Finally, the petition in No. 94-943 notes (at 6) that in *United States* v. *$40,877.59 in United States Currency*, 32 F.3d 1151 (1994), the Seventh Circuit recently rejected the use of the fugitive disentitlement doctrine in any civil forfeiture case.[10] That decision

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[10] The Seventh Circuit reasoned that forfeiture proceedings differ from other contexts in which the disentitlement doctrine has been applied because the government, rather than the fugitive, initiates the forfeiture proceeding. See 32 F.3d at 1154-1155. The court also expressed concern, on the facts of the case before it, with the adequacy of the government's allegations that the claimant was a fugitive and that the funds were subject to forfeiture. *Id.* at 1156-1157. The latter concerns are not at issue in

deepens a longstanding conflict in the circuits over the government's ability to invoke the doctrine at all in such a case. Compare *United States* v. *$83,320 in United States Currency*, 682 F.2d 573, 576 (6th Cir. 1982) (refusing to apply doctrine out of concern for third-party claimants or creditors of fugitive), with *United States* v. *$129,374 in United States Currency*, 769 F.2d 583, 589 (9th Cir. 1985) (rejecting Sixth Circuit's analysis), cert. denied *sub nom. Geiger* v. *United States*, 474 U.S. 1086 (1986), *United States* v. *Eng*, 951 F.2d at 465 (same), and other cases cited at page 9, *supra*; see also *United States* v. *Pole No. 3172, Hopkinton*, 852 F.2d 636, 643-644 (1st Cir. 1988) (refusing to apply doctrine where it was unclear whether the claimant's status as a fugitive in the criminal case was related to the civil forfeiture, and because the record failed to establish that the claimant had notice of the forfeiture proceeding); *United States* v. *Eng*, 951 F.2d at 467 (distinguishing *Pole No. 3172*).

While that conflict may call for review by this Court in an appropriate case, the question presented in these cases would not require its resolution. As noted above (see pages 9-10, *supra*), petitioners have consistently challenged only the lower courts' application in petitioners' cases of a doctrine that petitioners concede

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this case: petitioners have not contested that they are "fugitives" for purposes of the disentitlement doctrine, and the allegations linking funds in the defendant accounts to the Rodriguez-Gacha organization's drug trafficking activities are clear and substantial. See, *e.g.*, Aff. Attached to Complaint in C.A. No. 92-2295, at 5-9 (describing raid on Colombian ranch that disclosed various financial records relating to properties held in the name of Rodriguez-Gacha and his relatives, including records relating specifically to accounts at issue in these proceedings, and statements given by an individual who served as an investment adviser to Rodriguez-Gacha).

to be generally available in civil forfeiture proceedings, and the question presented in both petitions reiterates only that limited claim. 94-636 Pet. i; 94-943 Pet. i. While the body of the petition in No. 94-943 notes the existence of the Seventh Circuit's decision, neither petition cites any of the prior conflicting authority on the issue. See, *e.g.*, 94-636 Pet. 7; see also *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425, 427 n.5 (1993) (per curiam). Under the circumstances, the Court need not reach beyond petitioners' own submissions to consider the availability *vel non* of the fugitive disentitlement doctrine in the factually and procedurally complicated context of these cases.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1995

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 91-698 Civ-J-10

UNITED STATES OF AMERICA,
PLAINTIFF

vs.

CERTAIN FUNDS IN HONG KONG ORIGINALLY CONTAINED IN ACCOUNT NO (S). 3201514 (IN THE NAME OF TRANSCONTINENTAL TRADERS); 3003105 (IN THE NAME OF SLAVIA ASSOCIATION); AND

CERTAIN FUNDS IN HONG KONG CONTAINED IN ACCOUNT NO. 20164972-400 (IN THE NAME OF SLAVIA ASSOCIATION) LOCATED AT DRESDNER BANK,
DEFENDANTS

[Filed Nov. 19, 1993]

ORDER

Before the Court is the Claimants' emergency motion to amend or alter judgment and for reconsideration of judgment (Doc. 96). The claimants failed

to respond to the Government's supplemental motion to dismiss and the Court granted the Government's motion. The Claimants now argue that the Court should reconsider its order because the Court did not consider the Claimants' response (Doc. 38) to the Government's first motion to dismiss.[1]

The Court has reconsidered its order in light of the Claimants' response to the Government's first motion to dismiss. However, the response did not convince the Court that it should alter or amend its judgment in any way. The Court's order (Doc. 94) to dismiss the claims will remain unchanged.

Further, the Claimants argue that the Court should permit them to file a response to the Government's supplemental motion to dismiss. The motion was filed on June 4, 1993 and the Claimants did not respond within ten days as required by Rule 3.01 of Local Rules for the Middle District of Florida. Further, the Claimants still had not responded when the Court ruled on the motion over four months after the motion was filed. The Claimants will not be permitted to file a response to the Government's motion at this late date, after the Court already has granted the motion.

Accordingly, upon due consideration, the Claimants' emergency motion to amend or alter judgment and for reconsideration of judgment (Doc. 96) is granted to the extent that the Court has reconsidered its order in light of the Claimants' response to the Government's first motion to dismiss. Otherwise, the

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[1] The Court deferred ruling on the Government's first motion to dismiss (*See* Doc. 55). The Government later filed an amended complaint and the Claimants filed new claims. The Government then filed its supplemental motion to dismiss and the Claimants did not respond to that motion.

motion is DENIED and the Court's previous order will remain unaltered.

IT IS SO ORDERED.

DONE AND ORDERED at Jacksonville, Florida, this *18th* day of November, 1993.

_____

United States Distrct Judge

Copy to counsel of record

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 91-698 Civ-J-10

UNITED STATES OF AMERICA,
PLAINTIFF

vs.

CERTAIN FUNDS IN HONG KONG ORIGINALLY CONTAINED IN ACCOUNT NO (S). 3201514 (IN THE NAME OF TRANSCONTINENTAL TRADERS); 3003105 (IN THE NAME OF SLAVIA ASSOCIATION); AND

CERTAIN FUNDS IN HONG KONG CONTAINED IN ACCOUNT NO. 20164972-400 (IN THE NAME OF SLAVIA ASSOCIATION) LOCATED AT DRESDNER BANK,
DEFENDANTS

ORDER

Before the Court is the United States' supplemental motion to dismiss claims of Saadia Constanza Alvarez-Pimentel and Hilda Rodriguez De Cabrera and for entry of final forfeiture judgment (Doc. 93). The motion is ripe and the claimants have not responded.

The Court, by order entered March 3, 1993 (Doc. 66), directed the Government to submit properly

authenticated documentation to demonstrate that the funds in this case were seized by competent authority of the sovereign of the site of the funds. The Government complied with the Court's directive (Doc. 78). Now, the Government moves to dismiss the claims pursuant to the fugitive disentitlement doctrine.

Upon due consideration, the Government's motion to dismiss claims of Saadia Constanza Alvarez-Pimentel and Hilda Rodriguez De Cabrera's and for entry of final forfeiture judgment (Doc. 93) is GRANTED for the reasons stated in the Government's memorandum in support of the motion. The claims are dismissed and the Government shall file a form judgment of forfeiture in this case within ten (10) days.

IT IS SO ORDERED.

DONE AND ORDERED at Jacksonville, Florida, this *1st* day of November, 1993.

United States Distrct Judge

Copy to counsel of record

Supreme Court, U.S.
FILED
JAN 24 1995
OFFICE OF THE CLERK

(3) (3)

Nos. 94-636 and 94-943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SARA ALVAREZ, ANIBAL RODRIGUEZ, DOLORES CASTRO, HILDA RODRIGUEZ, and SAADIA PIMENTEL,

Petitioners,

v.

UNITED STATES,

Respondent.

HILDA RODRIGUEZ and SAADIA PIMENTEL,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

Nos. 94-636 and 94-943

SARA ALVAREZ, ANIBAL RODRIGUEZ, DOLORES CASTRO, HILDA RODRIGUEZ, and SAADIA PIMENTEL,
Petitioners,

v.

UNITED STATES,
Respondent.

HILDA RODRIGUEZ and SAADIA PIMENTEL,
Petitioners,

v.

UNITED STATES,
Respondent.

REPLY BRIEF FOR PETITIONERS

The opposition to these petitions never comes to grips with the central question of whether the government has the right to use the fugitive disentitlement doctrine in civil forfeiture actions where neither the claimants nor the property at issue are located in the United States. Instead, it spends most of its time chipping away at minor aspects of the claims filed by petitioners, leaving the basic question of governmental power unanswered. Because the question presented in both petitions persists, this Court should grant review.

1. Since filing the petition for *certiorari* in *Alvarez* last August, petitioners learned of the Seventh Circuit opinion in *United States v. $40,877.59 in United States Currency*, 32 F.3d 1151 (7th Cir. 1994), issued just before the petition was filed. The government states that the Seventh Circuit's decision "deepens a longstanding conflict in the circuits over the government's ability to invoke the fugitive disentitlement doctrine at all" to prevail in civil forfeiture cases. Opp. at 15-16. In fact, the Seventh Circuit's absolute rejection of the use of the doctrine in this context goes further than any prior opinion and creates a direct conflict with the decisions below and those of other circuits.

The Seventh Circuit held: "When applying the doctrine in government initiated civil forfeiture actions, the real injustice is that the government is allowed to confiscate property on mere allegation." 32 F.3d at 1155. Relying in large part on *Ortega-Rodriguez v. United States*, __ U.S. __, 113 S. Ct. 1199 (1993), *Hovey v. Elliott*, 167 U.S. 409 (1897), and other cases of this Court, the court of appeals found that use of the doctrine in this context raises significant constitutional questions. "Although a fugitive's conduct may be an affront to the court, it is a greater stain on our jurisprudence for the court in turn to discard those procedures that safeguard right and fair decisions." 32 F.3d at 1157. The court further recognized the significant procedural advantages enjoyed by the government in civil forfeiture actions, in which claimants bear the ultimate burden of proof. *Id.* at 1156. To afford claimants a hearing, the court found, "is only a slight burden on the government," *id.*, a burden which due process requires.

The Seventh Circuit's refusal to apply the fugitive disentitlement doctrine in a civil forfeiture proceeding, based on analysis of the case law and constitutional principles, stands in stark contrast to the Eleventh Circuit's rote application of that doctrine to dismiss the civil forfeiture

cases involved in these petitions. *Certiorari* should be granted to resolve the circuit courts' conflict on this issue.

2. Notwithstanding the undisputed conflict in the circuits, the government argues that the conflict should not be resolved here for two reasons. First, the government asserts that, because these petitions do not challenge the use of the doctrine in *all* civil forfeiture actions, but only in actions where neither the property nor the claimants are located in the United States, these petitions do not require resolution of the broadest conflict, and therefore are not appropriate vehicles for considering the issue at all. Opp. at 16. The conflicting views of the Eleventh and Seventh Circuits, however, are directly at issue in these petitions. Although the case before the Seventh Circuit did not involve the *in rem* jurisdictional issue presented in the petitions—and in fact, the Eleventh Circuit's cursory opinions below did not address the issue either—both circuits' decisions apply to a broad category of civil forfeiture cases that indisputably includes the cases at bar. That the facts here may also raise narrower questions about the use of the fugitive disentitlement doctrine does not eliminate the conflict or suggest that only the broader issue is worthy of review.

Second, in a confusing argument, the point of which seems to be that this Court should not consider the conflict in the circuits in ruling on these petitions, the government cites to footnote 5 in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 114 S. Ct. 425 (1993). In that footnote, the Court ruled that an intervention issue that was not included in the question presented there, but was discussed in the merits briefs and argued, was not properly before the Court. A conflict in the circuits, however, is not an "issue," as that word is used in *Izumi*. Rather, it is a reason why a question presented may be certworthy. Sup. Ct. R. 10 (1994). And, as reinforced by the government's opposition, Opp. at 16-17, and *United States v. $40,877.59 in United States Currency*, it is a compelling reason here.

3. The government faults the petitions as "fact-specific challenge[s]." Opp. at 7. Indeed, the question presented does ask whether use of the fugitive disentitlement doctrine is proper in specific circumstances. The petitions do not, however, raise any issue as to the existence of the facts or raise factual disputes. Rather, the common question presented in both petitions is highly susceptible to repetition and raises important unresolved legal issues. Every case before this Court arises in a factual setting, but that does not render their legal issues unworthy of review.

4. The government argues that the question of jurisdiction in these cases is of "little continuing importance" in light of 28 U.S.C. § 1355(b)(2) (Supp. 1993), which granted subject matter jurisdiction to district courts over civil forfeiture actions regarding property outside the United States. Opp. at 15. The issue here, however, involves not *subject matter* jurisdiction but *in rem* jurisdiction. These two concepts are, of course, quite different. Accordingly, section 1355(b)(2) does not diminish the significance of the issue presented here. If anything, the authorization to proceed contained in section 1355(b)(2) makes the government's action in these cases even *more* likely to recur. Indeed, because the government is repeatedly bringing civil forfeiture actions in cases where both the property at issue and the claimants are located outside the United States, the question presented is increasingly significant.[1]

5. In an effort to establish that the district court had *in rem* jurisdiction over the civil forfeiture actions, despite the undisputed fact that the property at issue was located outside the United States, respondent equates the government's ability to obtain the cooperation of foreign governments with court control over the property. Opp. at 14. *In rem* jurisdiction, however, refers not to the ability of

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[1] Indeed, counsel of record is aware of at least 14 such cases currently pending in the district courts and Eleventh Circuit.

the Executive Branch to recover assets abroad, but to the *court's* power over those assets. In two of the decisions below, the district court itself questioned that power. Pet. 94-636 at 7a, 12a.

The Agreements cited, Opp. at 14, do not purport to grant the United States courts jurisdiction over property in the United Kingdom or Hong Kong, or to provide the courts control over such property. Moreover, the United Kingdom's cooperation in transferring assets after *default judgments*, on the condition that it receive half the proceeds, Opp. at 14 & n.9, hardly establishes the *in rem* jurisdiction of the district court. *In rem* jurisdiction is waivable, must be specifically challenged, and was probably not challenged in circumstances where a default judgment was entered. Rather, unlike the judgments below, default judgments in civil forfeiture actions usually occur in *uncontested* proceedings, where no claims are made to the property. *See* Fed. R. Civ. P. 55(a); Supp. R. Admir. A. Although the foreign banks agreed to freeze the assets at issue here, the opposition does not state, as it cannot, that either the United Kingdom or Hong Kong has agreed to transfer these *contested* assets to the United States.[2]

6. Further attempting to belittle the merits of petitioners' underlying arguments, the government asserts that "Petitioners have relied . . . on speculative allegations that the government acted in bad faith in seeking the separate criminal indictment . . . ." Opp. at 11. First, there is little question that petitioners made out a *prima facie* case of retaliatory indictment. No further proceedings were had on the issue, however, as a result of the government's invocation of the fugitive disentitlement doctrine. Absent the

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[2] Even if the district court had *in rem* jurisdiction over the funds that were actually transferred to Florida, the government concedes that several million dollars remain at issue, over which the court has no "actual or constructive control." Opp. at 12 n.7.

government's response, petitioners could do no more, since the government had control over all the evidence on this point. Second, the government never denied, in any of the numerous written submissions and oral proceedings before the district courts and appellate court below, petitioners' allegations regarding the government's motive in indicting petitioners.

The government also contends that the proper forum for challenging its motive in indicting petitioners "would be the criminal proceeding." *Id.* Yet it was the government which brought the civil forfeiture actions and which, after obtaining an indictment against the claimants in those actions, moved to dismiss their claims on the basis of the fugitive disentitlement doctrine. Thus, the government not only initiated the actions below, but it interjected the criminal cases into those actions after petitioners filed their claims. Having done so, to suggest that petitioners' oppositions to the government's motions to dismiss could not challenge the very basis for those motions is disingenuous, at best. Whether or not the issue of bad faith indictment is a possible defense in the criminal proceeding, the issue is nonetheless relevant as a basis for opposing the assertions of fugitive disentitlement made against claimants in these civil forfeiture actions.

CONCLUSION

For the foregoing reasons and the reasons set forth in the petitions for *certiorari* in these cases, the petitions for a writ of *certiorari* should be granted.

Respectfully submitted,

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